No. 85654-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 39921-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BUSINESS SERVICES OF AMERICA II, INC.,
assignee of Natkin/Scott, a joint venture,

Appellant,

v.

WAFERTECH, L.L.C.,

Respondent.

(RESPONDENT)

SUPPLEMENTAL BRIEF OF ~~APPELLANT~~ BUSINESS SERVICES OF AMERICA II, INC.

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A. Introduction

The civil rules adopted in 1967 strike a balance between (1) affording plaintiffs every reasonable opportunity for an adjudication on the merits of their claims and (2) protecting defendants from delay due to dilatory conduct and allowing trial courts to manage their dockets. Trial courts have authority to impose the ultimate sanction of dismissal due to delay by a plaintiff, but CR 41(b)(1) limits that authority, unless the party has engaged in what is termed "unacceptable litigation practices," in which case the trial court is constrained by its discretion. "Unacceptable litigation practices" that go beyond "mere inaction," which are not subject to the limitation on dismissal in CR 41(b)(1), are those that impede adjudication of the action, such as violating court orders or failing to appear at hearings or trial.

Case law interpreting CR 41(b)(1) consistently provides that an action may not be dismissed for want of prosecution after the plaintiff notes the matter for trial, no matter how long the plaintiff has delayed in noting the matter for trial. A party has not engaged in "unacceptable litigation practices" by having its counsel withdraw and allowing the trial court to destroy its copies of exhibits. The Court of Appeals applied that precedent in deciding that the trial court could not dismiss the action after

plaintiff Business Services of America II, Inc. ("BSA") noted the matter for trial.

Defendant WaferTech LLC seeks to upset the present balance by having this court (1) redefine "unacceptable litigation practices" to include conduct that does not impede the litigation or interfere with the trial court's control of its docket, creating another basis for trial courts to avoid adjudicating claims on their merits, (2) allow a party's claim to be dismissed as a sanction without any notice or consideration of lesser sanctions, and (3) essentially overrule case law and retroactively apply a new interpretation of a court rule to an unsuspecting litigant.

The present balance has worked well for over forty years, being applied consistently by trial and appellate courts. *Stare decisis* warrants not changing that balance.

This appeal presents the court with an opportunity to expressly state as a rule what has been understood since CR 41(b)(1) was enacted. "Mere inaction" that can be the basis for a CR 41(b)(1) dismissal motion for want of prosecution does not literally mean "no activity whatsoever." It can include benign actions, such as a withdrawal or allowing the destruction of copies of exhibits, which neither advance nor impede the litigation. The rule to be announced is that only actions which impede the litigation or interfere with the trial court's ability to manage its docket are

"unacceptable litigation practices" for which the court can dismiss without regard to CR 41(b)(1).

B. Issues Presented for Review

1. Does CR 41(b)(1) preclude dismissal for want of prosecution after the plaintiff notes the matter for trial?

2. Does a withdrawal of counsel combined with allowing the trial court to destroy the court's copy of exhibits from a prior trial combine to constitute "unacceptable litigation practices" that could justify dismissal, the harshest sanction possible?

3 Is it necessary and desirable to set aside *stare decisis* in order to expand the scope of conduct that could be deemed "unacceptable litigation practices" that could warrant the ultimate sanction of dismissal?

4. Does the trial court need additional power to dismiss actions as part of case management?

C. Statement of the Case

The Court of Appeals' opinion accurately and succinctly states the facts and prior history relevant to the issues for review.

To briefly summarize, the Court of Appeals, in a prior appeal, ruled that the trial court erroneously granted summary judgment in favor of defendant WaferTech on BSA's lien claim, one of several claims asserted by BSA. *BSA v. WaferTech*, No. 28886-9-II (2005). The Court

of Appeals remanded the action to the trial court for adjudication of the lien claim. *Id.*

The only action for almost four years thereafter was (1) the trial court's destruction in 2006 of its copies of the exhibits from the 2001 trial, and (2) the withdrawal of BSA's former counsel in 2008. CP 42 and 58. The destruction of exhibits was pursuant to a stipulation signed at the 2001 trial. CP 58. The withdrawal stated in part:

> No trial date is set. This case has been dismissed and judgment entered thereon against Plaintiffs.

CP 42-3.

The case had been dismissed in 2001, and a judgment entered against BSA for attorney fees. App. C to Brief of Respondent. However, the Court of Appeals reversed the dismissal of the lien claim. CP 33-4.

Neither the trial court nor WaferTech undertook any action in reliance upon the withdrawal. App. C to Brief of Respondent.

BSA retained new counsel and noted the lien claim for trial in 2009. WaferTech then moved to dismiss for BSA's "failure to prosecute its case for over four years after remand." CP 60. The trial court dismissed. CP 97. This appeal followed.

D. Argument

1. CR 41(b)(1) governs for dismissal for want of prosecution when the plaintiff fails to note the action for trial within one year of issues being joined.

The petition for review argues that BSA's conduct was beyond "mere inaction," so it was not covered by CR 41(b)(1). To put into context the argument about what the rule does not cover, it is helpful to first discuss what it is undisputed the rule does cover.

Superior courts have inherent authority to dismiss a party's claim. However, CR 41(b)(1) "limits the power of the trial court to dismiss for failure to prosecute after the issue is joined and the case noted for trial." *Wallace v. Evans*, 131 Wn.2d 572, 576, 934 P.2d 662 (1996).

CR 41(b) was adopted in 1967. It provided as follows:

> **(b) Involuntary Dismissal; Effect.** For failure of the plaintiff to prosecute or comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.
>
> (1) *Want of Prosecution on Motion of Party.* Any civil action shall be dismissed, without prejudice, for *want of prosecution*, whenever the plaintiff ... neglects to note the action for trial or hearing within 1 year after any issue of law of fact has been joined, ... *If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.* (emphasis added)
>
> (2) *Dismissal on Clerk's Motion.*
>
> (A) Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the

> clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution, unless ... a party takes action of record. ...

In 1997, CR 41(b)(2) was amended. CR 41(b)(1) has remained unchanged.

Prior to adoption of CR 41(b)(1), the only way to avoid dismissal for want of prosecution was to note the matter for trial within one year of the issues being joined. CR 41(b)(1) added a protection for plaintiffs. It provides that if the action was noted for trial prior to the hearing on the motion to dismiss for lack of prosecution, the action "shall not be dismissed." This provision was included to promote actions being decided on their merits, not on procedural technicalities. *Snohomish Co. v. Thorp Meats*, 110 Wn.2d 163, 168, 750 P.2d 1251 (1988). It provides a plaintiff a final opportunity to note its case for trial. *Id.*

CR 41(b)(1) also protects defendants. Any time an action has been pending for a year without being noted for trial, a defendant can seek dismissal. If the plaintiff does not note the matter for trial, the trial court must dismiss. The trial court may not exercise discretion and allow the matter to remain dormant.

Here, BSA noted this matter for trial prior to WaferTech filing its motion to dismiss, so the trial court had no authority to dismiss for want of prosecution pursuant to CR 41(b)(1). Therefore, the approximate four-

year period between remand in 2005 and BSA's note for trial in 2009 cannot be the basis for the trial court's dismissal of BSA's lien claim. Where a defendant does nothing to move a matter forward, that defendant is deemed to have acquiesced in the delay. *Foss Maritime Co. v. Seattle*, 107 Wn.App. 669, 675-6, 27 P.3d 128 (2001).

WaferTech asks this court to limit the "mere inaction" which can be subject to a CR 41(b)(1) dismissal motion to mean no activity at all, so that such benign conduct as a withdrawal of counsel and allowing the destruction of copies of exhibits are "unacceptable litigation practices."

2. BSA has not engaged in "unacceptable litigation practices" outside the scope of CR 41(b)(1) by allowing the trial court to destroy exhibits and having its prior counsel withdraw.

WaferTech asks this court to equate benign actions of counsel withdrawing and allowing the trial court to destroy its copies of exhibits from a prior trial with violating court orders and failing to appear at trial, in order to justify dismissal. That would be unprecedented, and even if this court were to agree with WaferTech, the harshest sanction of dismissal would require consideration of lesser sanctions before it could be imposed. If BSA led anyone to believe it would not pursue its lien claim, WaferTech's remedy is the defense of equitable estoppel.

A review of WaferTech's motion to dismiss and supporting papers in the trial court, and Court of Appeals brief, show that WaferTech has

only recently come to see the statements made by BSA's former counsel in its 2008 Notice of Withdrawal as significant. Until now, WaferTech argued CR 41(b)(1) does not apply after remand, and even if it did, the withdrawal itself and allowance of destruction of documents provided the basis for dismissal. Having lost on those arguments, WaferTech, in its Petition for Review to this court, is now focused on the actual language of the Notice of Withdrawal as supposedly leading it and the trial court to believe BSA would not pursue its lien claim.

The language in the Notice of Withdrawal was not significant for the trial court. There is no indication in the record that the trial court had even read the Notice of Withdrawal prior to dismissing the action. Even if the trial court had been aware of the language in the withdrawal, that language would not support dismissal.

a. A withdrawal has never been deemed an "unacceptable litigation practice."

The withdrawal by BSA's former counsel and allowing the destruction of the trial court's copies of exhibits, separately or together, are not "unacceptable litigation practices," that takes BSA's inaction outside the scope of CR 41(b)(1). Where "dilatoriness *of a type* not described by CR 41(b)(1) is involved," the court retains inherent authority to dismiss. *Thorp Meats*, *supra* at 169 (emphasis added).

Prior decisions have not defined "unacceptable litigation practices" that are not "of the type" which could be the basis for a dismissal outside CR 41(b)(1), but the examples mentioned show what was meant. "Unacceptable litigation practices" include violating court orders and failing to appear at trial, actions that impede adjudication of the matter. *Id.*, citing *Gott v. Woody*, 11 Wn.App. 504, 508, 524 P.2d 452 (1974).

In *Apostolis v. Seattle*, 101 Wn.App. 300, 3 P.3d 198 (2000), dismissal was justified when a plaintiff filed briefs late, failed to attend a conference, and failed to engage in a required mediation. This was deemed willful, deliberate, and inexcusable. In *Peterson v. Cuff*, 72 Wn.App. 596, 865 P.2d 555 (1994), the party failed to appear at his deposition three times, and again failed a fourth time after being ordered by the court, prior to dismissal.

In *Wallace v. Evans, supra*, this court addressed a defendant's assertion that certain conduct went beyond "mere inaction" that would support dismissal outside of CR 41(b)(1). This court stressed that the "dilatoriness not of type described by CR 41(b)(1)" was that which challenged the trial court's authority to manage its affairs by assuring compliance with rulings and observance of hearing and trial settings. 131 Wn.2d at 577-8.

Here, BSA did not violate any court orders or fail to appear at any court hearings or trial, nor did anything to impede adjudication of the action. The trial court's destruction of its copies of exhibits from the 2001 trial will have no effect on the trial of the lien claim, for several reasons. First, the lien claim trial will not include the other claims that were part of the 2001 trial, so exhibits related to those other claims will not be part of the trial.

Second, the parties are responsible for retaining their own copies of such exhibits. Third, to the extent BSA did not retain copies of necessary exhibits, that will be BSA's hurdle to overcome at the lien claim trial. To the extent WaferTech did not, that can be addressed at the lien claim trial.

That leaves the withdrawal by BSA's counsel as the only possible "unacceptable litigation practice." That withdrawal did not impede adjudication of the lien claim. It did not cause BSA to miss any court dates or hearings or delay trial; no hearings or trial had been scheduled. It did not mislead the trial court or WaferTech into doing anything that would affect a lien claim trial. It had no effect on the action at all. The action proceeded in the same manner after the withdrawal as it did prior, which is to say it did not proceed at all. The trial court, WaferTech, and BSA continued to do nothing.

The withdrawal did contain a statement about the case being "dismissed," which taken out could be misleading, but it did not mislead the trial court or WaferTech, nor did it induce any action in reliance upon it. The withdrawal is not comparable in any way to the "unacceptable litigation practices" identified by Washington courts as outside the scope of CR 41(b)(1) which would warrant the punitive sanction of dismissal.

b. The sanction of dismissal for "unacceptable litigation practices" requires consideration of lesser sanctions.

The sanction of dismissal for "unacceptable litigation practices" requires consideration of lesser sanctions. A dismissal is punitive or administrative in nature. *Thorp Meats, supra* at 168.

A dismissal for unacceptable litigation practices, as a sanction, is analogous to a dismissal under CR 37 for discovery violations. Tegland, 3A *Wash. Prac.: Rules Prac.*, p. 354 (2006). Under CR 37, a trial court must consider several factors, including whether (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686-7, 41 P.3d 1175 (2002). A party's disregard of a court order without reasonable excuse or justification is

deemed willful. *Id.* A default was justified when a defendant failed to comply with discovery after being warned such failure could result in default. *RCL Northwest v. Colorado Resources, Inc.*, 72 Wn.App. 265, 272, 864 P.2d 12 (1993).

Given that dismissal is such a harsh sanction, federal courts, applying a similar dismissal rule, are hesitant to dismiss for unacceptable litigation practices. Dismissal is the most severe sanction, and reserved for the most egregious misconduct. *Ruiz-Rosa v. Rollan*, 485 F.3d 150, 154 (1st Cir. 2007). Dismissal is proper only "upon a serious showing of willful default." *Gill v. Stolow*, 240 F.2d 669, 670, (2nd Cir. 1957). Except in the most extreme circumstances, courts should resort to a lesser sanction than dismissal. Wright & Miller, *Fed. Prac. & Proc.: Civ.3d* § 2369, p. 625 (2008). Only "contumacious conduct" warrants dismissal. *Id.*

The sanction of dismissal after the withdrawal by BSA's former counsel was excessive, given that BSA's conduct was benign compared to the conduct that might warrant the ultimate sanction of dismissal. The withdrawal had no effect on the trial court, WaferTech, or the administration of justice. The trial court did not even cite the withdrawal as a basis for the dismissal. WaferTech now seeks to make a proverbial "mountain out of a molehill" in order to deny BSA an adjudication on the

merits of its lien claim. That contradicts both the letter and spirit of the civil rules.

If WaferTech was truly misled by the withdrawal, there is a legal doctrine that would apply to protect it, but even a cursory analysis shows the doctrine would not support dismissal.

c. WaferTech is essentially arguing that BSA should be estopped from asserting its claim, but cannot meet the required elements for equitable estoppel.

While WaferTech is not arguing that the doctrine of equitable estoppel bars BSA's claim, that is the legal doctrine that is applicable to protect WaferTech if it was truly misled or harmed in any way by BSA's former counsel's withdrawal. Equitable estoppel may apply where an admission, statement, or act has been detrimentally relied on by another party. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wash.2d 1, 19, 43 P.3d 4 (2002).

The elements of equitable estoppel are: (1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reasonable reliance on the first party's act, statement or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *City of Seattle v. St. John*, 166 Wn.2d 941, 949, 215 P.3d 194 (2009).

Here, WaferTech is arguing that the withdrawal communicated to the trial court, and presumably WaferTech, that BSA would not be pursuing its lien claim. However, WaferTech never attempted to confirm such an understanding with BSA. As for the trial court, there is no indication in the record the trial court was ever even aware of the statements in the withdrawal to the effect that the action had been concluded. Therefore, the withdrawal did not communicate to WaferTech or the trial court that BSA would not be pursuing its lien claim.

Even if WaferTech or the trial court had an understanding that BSA would not be pursuing its lien claim, neither took any action based on it. No one was misled.

Given that existing case law does not support characterizing a withdrawal of counsel as "unacceptable litigation practices," this court would need to modify or overrule that case law to reverse the Court of Appeals. The present case provides no justification for now expanding "unacceptable litigation practices" to include benign conduct that did not mislead or prejudice the trial court or another party.

3. *Stare decisis* supports not modifying the longstanding criteria for unacceptable litigation practices to include a withdrawal of counsel.

Stare decisis supports not modifying the longstanding criteria for unacceptable litigation practices to include a withdrawal of counsel and

allowing the destruction of copies of documents. In Washington, *stare decisis* protects reliance interests by requiring "a clear showing that an established rule is incorrect and harmful before it is abandoned." *State v. Devin,* 158 Wash.2d 157, 168, 142 P.2d 599 (2006. *Stare decisis* "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Keene v. Edie,* 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)).

Washington courts have been consistent since adoption of CR 41(b)(1) in 1967 that the unacceptable litigation practices that would warrant dismissals, beyond delay, are things that impede the litigation. These include violating court orders and failing to show up for hearings or trial. The withdrawal of counsel is not similar in any way.

If CR 41(b)(1) is to narrowed to not apply when a plaintiff has taken some benign action, but not noted the matter for trial, the procedure of GR 9 for amending rules is an available avenue to accomplish this change. Such an amendment will not subject litigants, such as BSA, to unfair surprise by changing the interpretation of the rule to their detriment. *Stare decisis* supports affirming the current understanding of CR 41(b)(1).

4. The trial court's case management powers are not at stake.

While dismissal is available as a sanction for a party's conduct which interferes with the trial court's management of its docket, case management is not at issue here. First, it is undisputed that CR 41(b)(1) precludes dismissal for want of prosecution if the case is noted for trial prior to a hearing. This does not "destroy a trial court's inherent authority to manage its calendar." *Thorp Meats, supra* at 169.

Second, trial court's have sufficient authority under the civil rules to manage their dockets without dismissing actions based on withdrawals of counsel. Under CR 41(b)(2), a clerk can dismiss actions, after notice to the parties and an opportunity for responsive action, if there has been no activity for twelve months. Under CR 16, the trial court may require attorneys to appear for a scheduling conference. If a party's counsel fails to appear and/or violates any pretrial order, the trial can sanction the party, with such sanctions including dismissal. Tegland, *supra.*

Expanding the trial court's discretion to dismiss actions, as part of its case management power and responsibility, is not necessary. The court rules and existing criteria for determining unacceptable litigation practices provide sufficient power to trial courts to manage their dockets.

E. Conclusion

The Court of Appeals properly applied CR 41(b)(1) and existing case law to preclude dismissal of BSA's lien claim. The rule and case law strike a sensible, prudent, and workable balance between providing plaintiffs with an opportunity for adjudication of their claims on the merits, and protecting defendants by dismissing actions as a sanction for dilatory conduct.

Any difficulty for the trial court presented by BSA's lien claim is in the nature of the claim itself, not the delay by BSA in pursuing it or the withdrawal by its former counsel. BSA asks that this court affirm the Court of Appeals, announcing the rule that "unacceptable litigation practices" that justify dismissal outside CR 41(b)(1) are those that actively impede the litigation.

DATED this 8th day of August, 2011.

HULTMAN LAW OFFICE

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CERTIFICATE OF SERVICE

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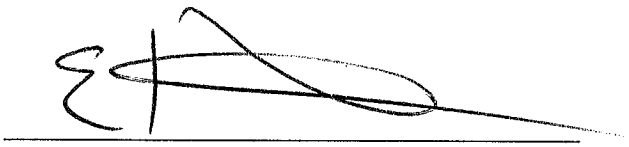

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